# INTERNATIONAL FOCUS ON RIGHTS OF CHILDREN AND THE INDIAN CONTEXT OF HUMAN RIGHTS OF CHILDREN- EMPHASIS ON THE NEGLECTED & THE DISABLED.

## SYNOPSIS

### INTRODUCTION

It is an oft-quoted saying that child is the father of mankind. The upbringing of children today in a healthy environment, both physically and mentally, is the first step towards a prosperous world tomorrow. Unfortunately, the need to ensure humane treatment towards the fundamental needs of children was not at all a concern for the societies till the recent past.

Even with the advent of human rights era, the needs of children were not specifically addressed and they continue to be vulnerable to various forms of exploitation, both in domestic and social spheres. Children have been working at home and outside; their working hours have not been limited and their wages have not been tendered. Although child sexual abuse is a heinous social evil for years, till recently the societies have not allowed open discussion of the problem. Children have become mere commodities and child trafficking and exploitation are the growing global trends. Child pornography ranks the third most lucrative business in the world after drugs and arms, involving millions of children.

Coming to the family, the break down of marriage ties or the continuing friction between the parents make the children the worst sufferers undergoing emotional insecurity and instability, experiencing financial disruption and social humiliations.

Poverty and economic instability deny the fundamental needs of nutrition and education to millions of children. Children thrown out to the street because of many reasons like extreme poverty, illegitimacy, neglect, disability fail victims of social evils of drug addiction, mafia-forced begging etc.

**SIGNIFICANCE OF THE RESEARCH**

This deplorable plight of children prompts to have a research work upon the rights of children. The inquiry into the international attempts may throw light in assimilating those rights which are scattered in various cultures. It also helps in placing the needs of children high on the international and municipal political agenda.

The recognition of basic rights of children by the international community reminds the responsibility of the state towards children. How far the Indian Legal system assures the manifold rights of children? The query into state's responsibility necessitates the examination of child welfare laws in India. A number of questions like, how far the relevant international documents have acquired legal acceptance in the municipal sphere? To what extent the available statutes protect the human rights of Indian children? Which are the areas in which legal intervention is required? What are the reasons for the failure of the existing mechanism in discharging obligations towards children? What is the scope and ambit of the new Right to Children to Free & Compulsory Education Act, 2009? To what extent the Commission for Child Rights helps to protect the rights of children? ---- have been examined during the course of research.

Again, it is felt that the neglected and the disabled children form a group which requires special consideration and protection in law. Though certain legislations in India place neglected children upon separate footing with a view to provide adequate care, the special homes setup under those Acts have become dens of exploitation. Coupled with

neglect and exploitation children in many of the remand homes and juvenile homes languish without basic rights.

Though the legislature has spoken a little about disabled children, they should also be subjected to a preferential treatment just because of their inability to stand neck by neck with ordinary children. They may be disregarded even by their parents; the society may not be able to understand their feelings. And besides, being mentally or physically disabled, children are easily amenable to all forms of abuses and exploitations. Hence it is for the state, by making adequate legislations providing appropriate arrangements, to ensure that disabled children should enjoy a decent and dignified life in an environment promoting self-reliance and facilitating active participation in community as declared in Article 23 of the U.N Convention on the rights of the child in 1989. Though many organizational steps have been initiated in India, the role of state in imparting adequate education, institutional protection and cultural frame works etc. for the disabled children is lagging behind when compared to the legal systems in Australia, U.S. and U.K.

In nutshell, this research work is having two-fold importance. Primarily it is to examine the relevant International documents of rights of children and their impact in the Indian Legal System. It is an attempt to point out the lacunae and suggest the required legal steps to be adopted. Secondly this study highlights the needs to regulate and efficiently utilize the existing legal frame work for the upliftment of children, especially, the neglected and disabled.

**STATEMENT OF THE PROBLEM**

Child is the most valuable asset of any society and state. The realization of this fact by the legal system results in recognition of children as a separate group with identifiable rights and needs. Still, it is a fact that children are increasingly suffering from various types of

maltreatment. The government has the major responsibility to see through the legislative measures and law enforcement machineries that the children are protected from such mal treatments. The international attempts for the protection of child rights, mainly the Convention on the Rights of the Child, provides for the basic structure and principles for framing, implementing and asserting the rights of the child in the municipal legal system.

Hence there is a need to look into the various aspects of child rights from the levels of the individual child, parent, family, community and society. From every viewpoint, it is clear that specific legislations are the real legal tools for the empowerment of children and for the protection of their rights. So any attempt to examine which are the legislative measures needed, would primarily see whether the existing framework is sufficient to meet the needs of the child, namely, protection of fundamental rights including health care, nutrition, education, equal opportunity etc., protection from deplorable events of life like, physical mal treatment, sexual abuse, emotional abuse,etc. Again it should be verified whether the legal system provides sufficient accommodation to the needs of the neglected and the disabled. At the final stage of the enquiry it will become clear that the present legal frame work is not sufficient to meet the needs of children, especially when analyzed on the measure of international principles of child rights.

Hence, the new guidelines for revising and modifying the existing legislations and formulating new legislative pieces may be provided.

**OBJECTIVES OF THE STUDY**

The research has the following objectives:

- Identification of the nature of ‘rights of child’ in international sphere
- Identification of the relevance and importance of protecting those rights

- Identification of the major resolves of the international community for the protection of the rights of child
- Identification of factors that threaten the recognition, maintenance, upholding and enforcement of child rights recognized by the international community, in the municipal arena of India
- Identification of the interrelationship between the international principles acceded by India and the legal principles of Indian legal system
- Identification of the major areas which need discussion as far as child rights are concerned
- Identification of the needs of most vulnerable categories like disabled and neglected children
- Identification of best practices existing elsewhere for protecting child rights
- Identification of the modalities by which child rights can effectively be protected in the national level, taking into account the international concern

**RESEARCH METHODOLOGY**

The success of a research programme ultimately depends upon the methodology adopted. The methodology adopted is basically analytical in nature. Doctrinal method is adopted to explore the objectives. Primary as well as secondary sources have been depended on while carrying out the research for the exposition of the legal frame work. Various International treaties, conventions, documents, reports, books and journals were examined for the purpose of examining the rights of the child in the International regime. To obtain the Indian position statutes, commentaries, books and case law in this regard were referred. The study of different legislations of various legal systems pertaining to child rights

is made in order to have a comparative overview and better suggestions for modification of legal provisions.

**SCHEME OF THE RESEARCH WORK**

To analyse the concept of child rights and to examine its nature and ambit of application and enforceability in the municipal legal framework of India, one has to understand the recognition of human rights of children in the International sphere. So the 1st Chapter discusses the various International Instruments on Human Rights of Children. In Phase I, it examines the recognition of rights of individuals generally and in Phase II, it highlights the recognition of rights specifically addressed to children. Chapter II examines in detail the Indian perspective of rights of the child.

Chapter III explores the scope of 'right to education' of children especially in the light of Article 21-A of the Constitution and the Right of Children to Free and Compulsory Education Act, 2009. Chapter IV pays attention to the neglected or abandoned children. The need for special care against economic exploitation is highlighted in this chapter.

Chapter V deals with child sexual abuse. It explicitly establishes the fact of dearth of sufficient law in this regard. The Offences against Children Bill, 2005 has been analysed in detail and the loopholes have been pointed out.

Chapter VI explores the socio-legal issues relating to rights of disabled children. Chapter VII discusses how the legal system can effectively manage the juveniles in conflict with law and secure their rights.

Chapter VIII explains the adoption practices in India. It highlights adoption as the best way to protect the best interest of the child, who may be abandoned, orphaned or in need of care and protection. It reveals the realities of the present adoption process**.** The legal problem of the lack of a uniform law of adoption is highlighted.

Chapter IX is devoted to analyze the actual plight of the unborn and it recognizes that the upholding of the rights of unborn is actually paving the way to the child rights.

Chapter X places family as the seat of child rights and highlights the responsibility of the state towards the protection of family. Chapter XI examines the scope of the newly constituted National Commission for Protection of Child Rights and put forth suggestions for the improvement of its functioning.

The concluding chapter highlights the areas left by the municipal legal system unasserted in the matter of assuring rights to children and the reforms needed in certain areas have been highlighted.

**FINDINGS**

- The definition of 'child' itself is not uniform in the various statutes. The issue of childhood becomes crucial as the international community recognizes that childhood begins from the moment of conception. The 'upper age limit of the child' in the definition of 'child' becomes determinative of many factors and issues like what should be the age limit of the child in protection matters? What should be the age of criminal responsibility? What is the age of consent? At what age should the wishes of the child be taken into account? At what age the parental consent is no longer required?... And the research shows that all such different situations are never possible to be governed by a single principle.
- It is required that certain especially vulnerable groups of children should have their entitlement to services extended beyond 18.
- It is suggested that the sexual offences legislations regarding children be used to prosecute even the mutually consenting sexual activities in which a child is involved. To protect younger children and adolescents and also to protect the sanctity of the institution of family, the law should be modified so that children under 18 can never

legally give consent in sexual matters, and that any sexual activity with a child aged 18 or under will be subjected to the maximum penalties.

- The law regarding adoption remains to be discriminatory and unjust, denying equal opportunities to children. There is no uniform procedure for adoption through out the territory of India.

Hence it is recommended that a uniform and comprehensive legislation dealing with all aspects of adoption may be made, making it applicable to all the people of India, irrespective of their religion.

- In appointing a guardian under the relevant law, in case of remarriage of either spouse, the minor child (boy or girl) shall not be obliged to live with the step father or step mother as the case be. When both the father and mother have remarried, the court shall be moved to interfere to determine with whom the guardianship or custody may be entrusted with.
- A legislative attempt in tune with the Children Act, 1989 of UK, where parental responsibility is shared with the state is required in India also. In discharging that responsibility of the Local Authority, other agencies like, education agencies, health authorities, etc., shall be made dutiful to assist the Local Authority, by statute.
- Provision for 'Special Guardianship' shall also be provided. Accordingly, a person in whose favour a 'Special Guardianship Order' is made will become the 'Special Guardian' of the child who acquires parental responsibility for the child which he or she can exercise to the exclusion of any other person with parental responsibility.
- There is no provision to monitor the welfare of the children during *lis pendence*, and hardly any effort is made by the Family Courts to ascertain periodically the living conditions of the children back home, their maintenance, health, psychological needs,

education etc. Hence the Family Courts Act, 1984 needs to be amended to take care the following:

1. The claims for maintenance of the parent petitioner and the minor child should not be clubbed together and must be dealt with separately by the Family Courts. This will ensure that the minor child starts getting its legally entitled maintenance quickly from the natural guardian irrespective of the procedural status of the litigation between the parents

2. The Family Courts should be empowered to entrust the maintenance of the child to the State Child Welfare Board

3. The counselling procedure laid down under the Family Courts (Kerala) Rules, 1989 needs to be made more child friendly.

4. The assistance of the State Child Welfare board should be made available to the Family Courts.

5. The recently established Commission for the Protection of Child rights can effectively be associated with the investigations, regular supervisions, examination of implementation of various court orders etc. Rule 17 of the National Commission for Protection of Child Rights Rules enables the Commission to undertake formal investigations, supervisions etc. as entrusted to it.

■ The study on the different facets of the right to education for children prompts the researcher to make the following observations:

(1) It is felt that the country is still in dire need of a National Education Policy which may fit to the needs of the time, and that in the absence of such a proper policy, the development of the educational services in the country would lack both in purpose and direction.

(2) Much more attention shall be paid by the states about the growing inadequacy of financial allocations for education from Plan to Plan.

(3) It is felt that the government may be willing to invest more and provide sufficient infrastructure and thereby attract the required human resources, towards the governmental sector.

(4) On enquiries it is also revealed that the utter disillusionment of the public with teacher performance is also a major problem that affects the quality of education.

(5) A major flaw in our educational planning and practice in the past had been that the school, almost by design, was not able to utilize the material as well as human resources from the surrounding community. Any new education policy to suit the present and future needs of this country, particularly in the rural and backward regions, must be based on the principle of maximising community participation and involvement.

(6) It is a reminder that right to education for children is not just a right to learn the basics of reading and writing. Our ultimate goal of a brighter and better future for children will never be realised until we place science and technology at the centre of things.

(7) And in principle, the constitutional status of education being in the ‘concurrent list' also may help attaining the goals effectively. It should be understood that concurrency of powers of the Union government and the state governments does not represent a ‘breach into the State governments' hold over education’; but concurrency offers ‘unlimited opportunities for closer collaboration’ between the Centre and the States.

(9) The new Act, the Right of Children to Free and Compulsory Education Act, 2009 also needs clarification in many of its grey areas:

(a) The extent to which the responsibility for imparting elementary education can be fixed upon ‘an unaided school run by minority groups’ needs further discussion by the legislature.

(b) Except for a mentioning in the proviso to section 3(2) that a child suffering from disability, shall have the right to pursue free and compulsory elementary education in accordance with the provisions of the Persons with Disabilities(Equal Opportunities, Protection and Full Participation) Act, 1996, the plight of a child suffering from disability is disregarded under the Act.

(c) As far as the ‘right to seek transfer to any school’ of a child is concerned, by virtue of section 5(2), ‘specified schools’ like ‘Kendriya Vidyalaya, Navodaya Vidyalaya, Sainik School or any other school having a distinct character which may be specified by notification by the appropriate government’ may be exempted from seeking the enforcement of that right. There is no reason, for exempting such schools from the purview of the Act, especially when any child up to 14 years of age is entitled under the Constitution itself, to exercise his right to pursue free and compulsory elementary education and as a corollary, all the rights emanating from the principal right.

(d) It should be made clear whether by virtue of section 7(6)(a) which says that “the Central Government shall develop a framework of national curriculum”, the existing state curricula shall be replaced.

(e) The duty of the parent laid down under section 10 should be entailed with a punishment so as to ensure better compliance by the parents.

(f) The exemptions permitted to be enjoyed by the specified category schools shall be omitted. But, such schools may be permitted to have selection of students only after the elementary level.

(g) Section 29(2) which lays down the curriculum standards, also omitted the needs of disabled children which should definitely be supplied with by an amendment.

(h) The jurisdiction and nature of powers of Commission for the Protection of Child rights shall be specifically defined, especially when it sits as an appellate body on appeals by persons aggrieved by the decision of the local authority.

(i) The protection of action taken in good faith, in pursuance of the Act, under section 37 is not a good law as it provides a wide sweep to cover the Central Government, State Governments, National Commission for the Protection of Child rights, State Commissions for the Protection of Child rights, Local Authorities, School Management Committee or any person acting in pursuance of the Act.

(j) Special quota of seats may be provided for disabled children in every school so that right to education of disabled children be protected.

■ There are very a few sections under the Indian Penal Code and other statutes to deal with child sexual abuse. Some crucial points to be noted in this regard are:

(1) The laws for women are extended to include children.

(2) Although section 377, dealing with unnatural offences, prescribes seven to ten years of imprisonment, in practise, such cases can be tried in a magistrate's court, which can impose maximum punishment of three years only.

(3) If the abuse is repeated several times it affects children more severely, however as yet there is no law for repeated offences against the one child.

(4) In cases of rape the burden of proof is on the victim of rape, however if the victim is a minor, the question of giving consent does not arise, as consent of a minor is not considered as consent in the eye of the law. In cases of child sexual abuse, at present the law that is referred to is section 376 of the IPC, where the age of consent is above 16 years.

(6) The 'presumptions' in the Immoral Traffic (Prevention) Act, 1986(as amended and renamed as The Suppression of Immoral traffic in women & Girls(Amendment) Act) make the evidence lightened.

(7) Section 67 of The Information Technology Act, 2000 which makes publication and pornography punishable is not sufficient in this regard as it does not cover all the possible abuses through internet or the like and allied technologies. The Cyber Crimes relating to children shall be defined properly and the Cyber Police Unit shall adequately be trained to deal with the situations effectively.

■ Though the governmental initiatives have provided different measures for the protection of children with disabilities, the aim to help the disabled children to enjoy their human rights as ordinary children, have yet to be attained. The analysis of the reasons for failure highlights the following realities.

**(i)** The society's relationship with children with disabilities, help a lot to deal with the complex process of training the disabled children.

**(ii)** The society should realise that children with disabilities have needs, characteristics and potentials similar to other children.

■ Reasonable accommodation for disabled children is an affirmative action. It requires non-discrimination, positive action, preferential treatment and to a certain extent, reverse discrimination. This reasonable accommodation shall include programmes designed to improve the self-reliance of the disabled children who form a disadvantaged group in our society. The concept of reasonable accommodation should be guided by the following motives:

i. non-discrimination shall reflect the removal of prejudices so that the disabled children can have the opportunity to be treated according to their merit.

ii the barriers created by society shall be removed so that qualified individuals can demonstrate their merit.

iii the 'merit' should be redefined in the event of disability so that we can give greater value to the traits and abilities which are possessed by the disabled groups.

iv ‘reverse discrimination’ reflects the awarding of an additional concern to the disabled persons so that they can have greater opportunity of being appraised with the ordinary children. For Example, a school which may ordinarily resist including a child with mobility problems from an outdoor pursuits camp on the ground that it will be difficult for that child, can include this particular child also with a preferential treatment by providing an attendant/alternative activities at the camp.

■ Need for Defining Disability is highlighted in this research work. The traditional concept of disability may fail to identify the problems of the present generation children. Along with Dysmorphism, microcephaly, cerebral palsy, seizures, autism, down syndrome, single gene disorder etc., the developmental disorders, behavioural problems, learning disabilities and the like also make children ‘disabled’ which deserves special attention and care.

■ The learning disability is identified as a ‘disability’, which requires special care and training, very recently only. In fact, it is a neurodevelopment defect in the capability to acquire all or most learned higher mental skills. It shows extreme aetiological heterogeneity and could be the result of prenatal (most common and mostly genetic), perinatal (mostly hypoxicischaemia) or post-natal (mostly trauma or infective onset diseases) processes.

■ An emotionally disturbed student also shall be recognized as a disabled child. An emotionally disturbed student is one who is: a student with an inability to learn which cannot be explained by intellectually sensory or health factors and who exhibits one or more of the following characteristics over a long period of time and to a marked degree:

a) an instability to build or maintain satisfactory interpersonal relationships with peers and teachers;

b) inappropriate types of behaviour or feelings under normal circumstances;

c) a generally pervasive mood of unhappiness or depression; or a tendency to develop physical symptoms or fears associated with personal or school problems.

■ Children are considered as vulnerable group in society; those with disabilities face additional challenges. Enabling disabled children to face additional challenges is the greatest challenge on the part of the parents and caregivers. To discharge effectively this responsibility, governmental support plays a vital role.

■ The right to education as enshrined in the Constitution shall be ensured for all disabled people, leaving aside any learning, socializing difficulties, which are caused by disability. All public and private schools, which have obtained recognition, should have the obligation to accept disabled children, even if they are in a situation of grave disability and the refusal of such children will amount to criminal offence. The schools must develop plans to assure free and appropriate education in line with the governmental policies.

■ The concept of free and compulsory education shall be explained as inclusive of special and related services to a disabled child which (A) have been provided at public expenses, under public supervision and direction, and without charge (B) meet the standards of the state educational agency (C) includes an appropriate pre-school, or elementary system, in the State involved and (D) are provided in conformity with the individualized education program.

■ Further the access to goods, facilities and services shall be made easier to the disabled group as a whole, especially our disabled children. By law it should be made unlawful for a provider to discriminate against a disabled child. The term ‘services’ here may include public places, means of communication and information services, accommodation services, banking, insurance, credit or financial facilities for education, entertainment, recreation or refreshment facilities, employment training agencies, *etc*.

And, with a strong legislative frame work and the united attempts of the state, society and family the better upbringing and rehabilitation of disabled children be effectively attained.

■ The ideal step to reform the conflicting children is to formulate an effective policy for administration of juvenile justice and implement the same. Again, for the attainment of all the child-rights, the significance of family stands in the first place. The primary goal of a juvenile justice system can be attained only by preserving the families. Hence the government

should formulate legal measures for the protection of individual family units. While intervention by state machinery is required the following points shall be considered by the wings of the state (legislature or executive or judiciary):

a) The family unit shall be preserved;

b) Intervention shall be limited to those actions which are necessary and utilize the least restrictive and most effective and appropriate resources;

c) The family shall be encouraged to participate actively in whatever treatment is afforded to a child;

d) Treatment in the community rather than commitment to a State Juvenile Training School shall be provided whenever possible.

The family and child welfare legislations must attempt to resolve the family problems so as to serve the best interests of children. The statutory framework should also provide measures to improve parenting skill including their financial stability to maintain children.

■ The juvenile court system also needs to be reformulated. Though the 2000 Act has replaced the present juvenile courts by Juvenile Justice Boards, no such Board is functioning now according to the principles of juvenile justice. The Boards have to be revitalized with the deeper understanding of the psychological and social forces including the differential associations, which bring children before the juvenile justice system.

The Board should be equipped with highly trained personnel in all such fields. These officials should be trained to recognize the educational, social and treatment needs of children. The Juvenile Justice Board shall be an inter-disciplinary body with a verity of professionals like lawyers, medical men, psychiatrists, psychologists etc.

■ The propositions towards speedy disposal of cases shall be with a motive to ensure that the developmental needs of the child are addressed and the child continues to live in his growth and development.

The basic human rights of the child must be protected, including notice of charges, right to counsel, right to confrontation and cross-examination, privilege against self-incrimination, right to transcript of proceeding, right to appellate review. The practice of 'plea-bargaining' shall be strictly scrutinised.

The institutions dealing with the conflicting child should be guided by set standards and the Boards should be able to supervise the services provided to the child therein.

■ It is well appraised that the Commission for the Protection of Child Rights is effectively discharging its functions in analysing the existing legal framework for children, assessing compliance and submitting reports regarding policies to be formulated in matters relating to child rights. But the main draw back of the Child Rights Commission is that it is a mere replica of other commissions like Human Rights Commission and Women's Commission. Its role is limited to just recommendatory directives and lacks any power to enforce the recommendations.

■ The legal implication as far as the enforceability of treaty obligations is concerned, is that the absolute enforceability depends upon the question of availability of a municipal statute which in turn points to the state responsibility to frame statutes incorporating international principles which we have already ratified. Presently, in the absence of a fundamental right or a legal right, the mere governmental adhesion to an international principle will not provide *locus standi* to an aggrieved person. So it is left to the state to make adequate municipal laws in relation to the international obligations and thus to uphold the better interests of children.

As the apex judiciary has reiterated in many cases the principle that in the absence of a municipal law, the contents of international conventions and norms are significant for upholding fundamental rights, the provisions of the Convention on the Rights of the Child 1989 which India has ratified, can be enforced even without any statute if they are in consonance with the fundamental rights.

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